

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group: 2

Program: Other Agency

Question: BE14/063

Senator Madigan asked the following question at the hearing on 26-29 May 2014:

1. Can the Family Court of Australia demonstrate to the Senate that the parliamentary intent in legislation to implement 'shared parenting' is not 'continuing to be ignored' as per the culture reflected in past findings such as the Every Picture Report at paragraph 2.25?
2. Can the Family Court of Australia demonstrate positive gains in the performance of Independent Children's Representatives, given that historically young adults have reported to parliament and stressed that in their view the 'child representative' in their own cases had not represented their view, nor from their perspective their best interests, as well as they had expected? (Paragraph 2.20)
3. Is the Family Court still ordering child custody according to common perception of custody as an 80/20 'Rule' given that parliament has found justifiable grounds for the belief the Family Court applies such a culturally based rule? (Paragraph 2.14)
4. Given that parliament has clearly indicated in legislation for shared parenting, and has previously found that it is no longer appropriate to define parenting roles by gender alone, what evidence in legal outcomes can the Family Court of Australia present that it is effective in determining the an appropriate to focus on the role each parent performs? (Paragraph 1.49)

The answer to the honourable senator's question is as follows:

The Chief Executive Officer of the Family Court of Australia who is tasked with answering these questions is of the view sub-questions (1), (3) and (4) asked by the Honourable Senator relate to the judicial work of the judges of the Court, and cannot be answered for reasons that follow.

The entity "The Family Court of Australia"¹, exists for administrative and financial purposes under the *Public Service Act 1999* and the new *Public Governance Performance and Accountability Act 2013*. The Chief Executive keeps statistics about case management, timeliness and a number of other matters on which the Chief Justice is required to report to the Parliament via the Annual Report (s 38F of the *Family Law Act 1975*) and to the Productivity Commission.

The Chief Justice, although responsible for the administration of the Court, is also a judge under Chapter III of the Constitution. In the exercise of its judicial function, the entity of "the Family Court of Australia" does not exist, other than as a collection of individual judges. The judicial work of the Chief Justice and other judges of the Court can only be explained through their decisions. Their decisions are available via the AustLII website (www.austlii.edu.au) and the reasoning in each case is transparent. Thus, sub-questions (1), (3) and (4) cannot be answered because "the Family Court of Australia" does not decide cases, individual judges do.

¹For the purposes of the *Public Governance Performance and Accountability Act 2013*, the Family Court of Australia and the Federal Circuit Court of Australia are administered by the agency known as the Family Court and Federal Circuit Court. Richard Foster is the Chief Executive Officer of all three 'bodies'.

Importantly, judges take an oath upon being sworn in and they are required to apply the law. Decisions are amenable to appeal and errors of law or fact may result in the overturning of a decision. By way of information the following are some of the seminal decisions of the Appeal Division in relation to the application of the parenting amendments enacted by the *Family Law Amendment (Shared Parenting Responsibility) Act 2006*: *Goode & Goode* [2006] FamCA 1346; *Taylor v Barker* (2007) FLC 93-345; *McCall & Clark* [2009] FamCAFC 92; *Marvel & Marvel (No 2)* [2010] FamCAFC 101; *SCVG & KLD* [2014] FamCAFC 42.

It is also important to note that the *Family Law Act 1975* was amended in 2012 by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2012* after the report *Every Picture Tells a Story*. The overriding purpose of these amendments was “to provide better protection for children and families at risk of violence and abuse” (Replacement Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, 13 October 2011). The key amendments included prioritising the safety of children in parenting matters and changing the definitions of ‘abuse’ and ‘family violence’ to better capture harmful behaviour.

In addition, it is crucial to any consideration of decisions relating to family law to acknowledge the place of the Federal Circuit Court of Australia. The composition of the work of the Family Court of Australia has steadily changed over the last 14 years, largely since the commencement of the Federal Circuit Court (then Federal Magistrates Court of Australia) in 2000. There has been a progressive shift in the balance of the filings between the two courts with the majority of all family law parenting cases now conducted in the Federal Circuit Court, with the Family Court hearing fewer cases at first instance (as opposed to its appellate function) being approximately 15% of the first instance filings. Accordingly, the Family Court is hearing only the most complex and intractable cases requiring substantial court time. These include those involving allegations of physical or sexual abuse of children, family violence mental health issues, substance abuse issues, domestic and international relocation, international child abduction and the Hague convention, nullity of marriage and special medical procedures (Family Court of Australia Annual Report 2010-11 p. 13).

Thus, any exploration of the work of the Family Court of Australia, at first instance, will represent only a small percentage of family law cases and no proper appreciation of decisions relating to family law can be gained by looking only at the decisions of the Family Court of Australia. The majority of parenting cases are dealt with by the Federal Circuit Court of Australia.

In response to sub-question (2), it would not be appropriate for the Family Court of Australia to comment in the area. The question is better directed to the respective bodies that oversee the conduct of the legal profession. However, following the release of the AIFS report on Independent Children’s Lawyers (ICLs) and through the work of its Children’s Committee, the Family Court and Federal Circuit Court have been engaging with National Legal Aid and State bodies to assist in training of ICLs to ensure representation of the highest quality.

It needs to be understood that under the *Family Law Act 1975*, the ICL does not directly represent the child in the sense that they are bound by the child’s wishes or views. Under the *Family Law Act 1975*, the ICL should provide to the Court any views the child may wish to express, but is not bound to promote those views if they do not think them to be in the best interests of the child. These provisions appear in section 68LA of the Act which is reproduced below (see in particular s 68LA(4)).

FAMILY LAW ACT 1975 - SECT 68LA

Role of independent children's lawyer

When section applies

(1) This section applies if an independent **children's lawyer** is appointed for a **child** in relation to **proceedings** under **this Act**.

General nature of role of independent children's lawyer

(2) The independent **children's lawyer** must:

(a) form an independent view, based on the evidence available to the independent **children's lawyer**, of what is in the best **interests** of the **child**; and

(b) act in relation to the **proceedings** in what the independent **children's lawyer** believes to be the best **interests** of the **child**.

(3) The independent **children's lawyer** must, if satisfied that the adoption of a particular course of action is in the best **interests** of the **child**, make a submission to the **court** suggesting the adoption of that course of action.

(4) The independent **children's lawyer**:

(a) is not the **child's** legal representative; and

(b) is not obliged to act on the **child's** instructions in relation to the **proceedings**.

Specific duties of independent children's lawyer

(5) The independent **children's lawyer** must:

(a) act impartially in dealings with the parties to the **proceedings**; and

(b) ensure that any views expressed by the **child** in relation to the matters to which the **proceedings** relate are fully put before the **court**; and

(c) if a report or other document that relates to the **child** is to be used in the **proceedings**:

(i) analyse the report or other document to identify those matters in the report or other document that the independent **children's lawyer** considers to be the most significant ones for determining what is in the best **interests** of the **child**; and

(ii) ensure that those matters are properly drawn to the **court's** attention; and

(d) endeavour to minimise the trauma to the **child** associated with the **proceedings**; and

(e) facilitate an agreed resolution of matters at issue in the **proceedings** to the extent to which doing so is in the best **interests** of the **child**.

Disclosure of information

(6) Subject to subsection (7), the independent **children's lawyer**:

(a) is not under an obligation to disclose to the **court**; and

(b) cannot be required to disclose to the **court**;

any **information** that the **child** communicates to the independent **children's lawyer**.

(7) The independent **children's lawyer** may disclose to the **court** any **information** that the **child** communicates to the independent **children's lawyer** if the independent **children's lawyer** considers the disclosure to be in the best **interests** of the **child**.

(8) Subsection (7) applies even if the disclosure is **made** against the wishes of the **child**.